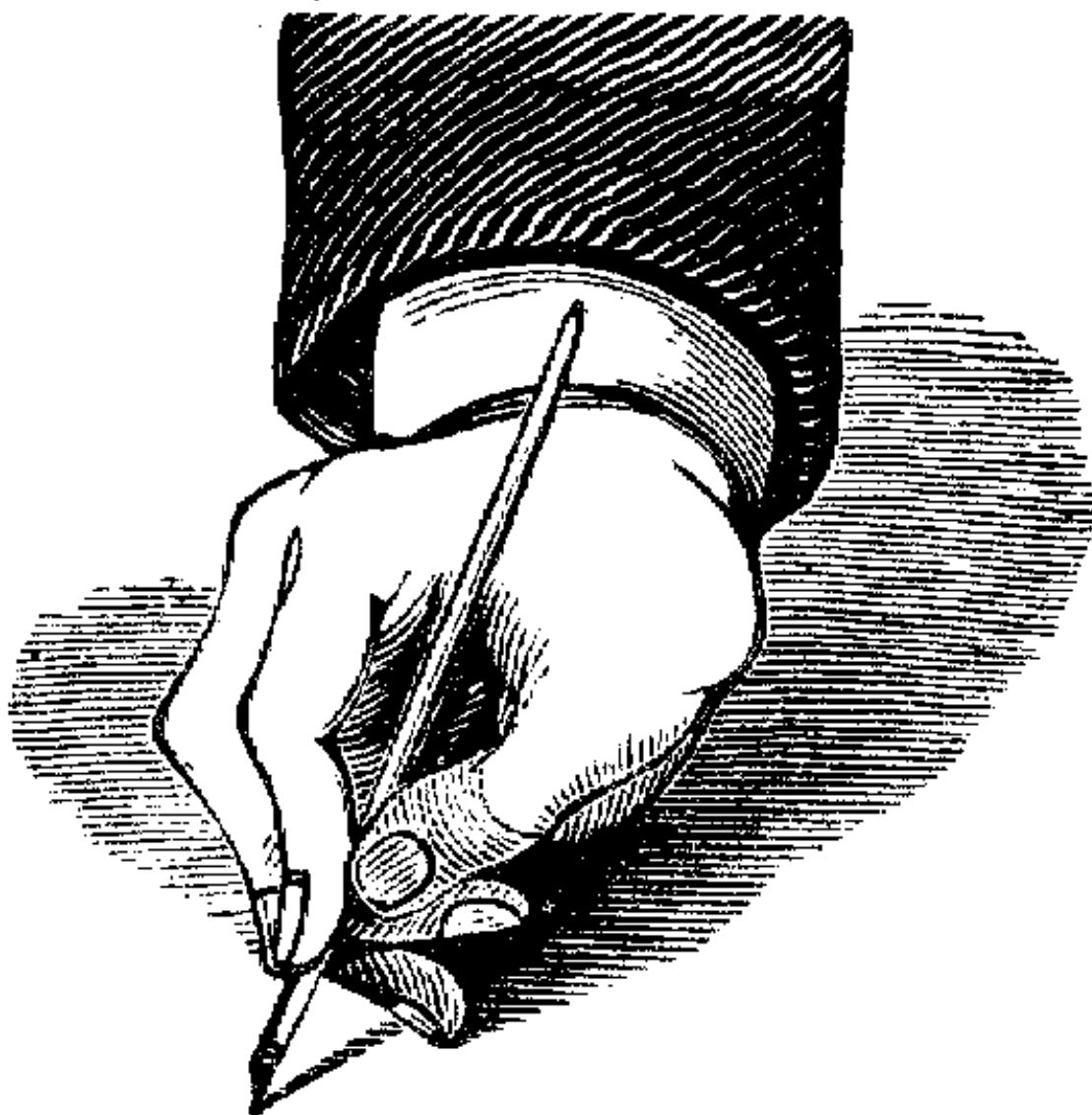


# *Chapter 21*

## **Contract Changes**



*2014 Contract Attorneys Deskbook*

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**CHAPTER 21**  
**CONTRACT CHANGES**

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## CHAPTER 21

### CONTRACT CHANGES

#### I. INTRODUCTION

- A. Generally. Government Contracts are not perfect when awarded. During performance, many changes may be required in order to fix inaccurate or defective specifications, react to newly encountered circumstances, or modify the work to ensure the contract meets government requirements. Any changes made to a government contract may force a contractor to perform more work, or to perform in an often more costly fashion, and may require additional funding. Unfortunately, the parties do not always agree on the scope, value, or even the existence of a contract change. Contract changes account for a significant portion of contract litigation.
- B. References.
1. Federal Acquisition Regulation (FAR) part 43, 50.1, 52.243-1 to 7, 52.233-1.
  2. John Cibinic, Ralph Nash and James Nagle, Administration of Government Contracts, Ch. 4, Changes (4th Ed., 2006).
  3. Ralph C. Nash, Jr. & Steven W. Feldman, Government Contract Changes (3d ed. 2007).
- C. Definitions.
1. **Contract Change** – Any addition, subtraction, or modification of the work required under a contract made during contract performance. This is distinguished from an “amendment” which usually denotes a change to a solicitation.
  2. **Formal Contract Modification** – Any written change in the terms of a contract. (FAR 2.101)
  3. **Change Order** – A unilateral, written order, signed by the contracting officer, directing the contractor to make a change that a Changes Clause authorizes. FAR 2.101. This is an order for a change in the contract, with or without the contractor’s consent. This is a right to make a unilateral change vested in the Government, not the contractor. FAR 43.201. (FAR 2.101)

4. **Informal (Constructive) Contract Change** – Any contract change effected through other than formal means (verbally, etc.). (FAR 43.104)
5. **Unilateral Contract Change** – A contract modification executed only by the contracting officer. (FAR 43.103(b))
6. **Bilateral Contract Change** – A contract modification executed by both the contracting officer and the contractor after negotiations (also called a supplemental agreement). (FAR 43.103(a))
7. **Administrative Change** – A contract modification (in writing) that does not affect the substantive rights of the parties. (FAR 43.101)
8. **Substantive Change** – A contract change that affects the substantive rights of the parties with regard to contract performance or compensation.
9. **Changes Clause** – A contract clause that allows the contracting officer to make unilateral, substantive changes to a contract, as long as the changes are within the general scope of the contract. (FAR 43.201)
10. **In-Scope Change** – A contract change that is within the general scope of the original contract in terms of type and amount of work, period of performance, and manner of performance.
11. **Out-of-Scope (“Cardinal”) Change** – A contract change that is not within the general scope of the original contract in terms of type and amount of work, period of performance, and manner of performance.
12. **Equitable Adjustment** – A contract modification, usually to contract price, that enables a contractor to receive compensation for additional costs of performance including a reasonable profit, caused by an in-scope contract change.
13. **Request for Equitable Adjustment (REA)** – A contractor request (not a demand – see “claim” below) that the contracting officer adjust the contract price to provide an equitable (i.e. “fair and reasonable”) increase in contract price based on a change to contract requirements. REAs are handled under the contract’s Changes Clause.
14. **Claim** – a written demand, as a matter of right, to the payment of a sum certain or other relief. Claims are handled under the Contract Disputes Act (CDA). (FAR 2. 101)
15. **Intrinsic Evidence** – evidence of the intent of the contracting parties found within the words of the contract (and supporting documentation).
16. **Extrinsic Evidence** – evidence external to, or not contained in, the body of a contract, but which is available from other sources such as statements by

the parties and other circumstances surrounding the transaction. Black's Law Dictionary, 1999.

17. **Latent Ambiguity** – An ambiguity that does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed. Black's Law Dictionary, 1999.
18. **Patent Ambiguity** – An ambiguity that clearly appears on the face of a document, arising from the language, itself. Black's Law Dictionary, 1999.

## II. AUTHORITY TO CHANGE A CONTRACT

- A. In whom the authority vests. Only the contracting officer, acting within his or her authority, can issue a contract change.<sup>1</sup> (FAR 43.102(a)) This rule prohibits other government personnel from:
  1. Executing a contract change;
  2. Acting in such a manner as to cause the contractor to believe they have authority to bind the government; or
  3. Directing or encouraging the contractor to perform work that should be the subject of a contract modification.
- B. Delegation. Some government officials, in executing their duties as delegated by the contracting officer, may direct contractor actions while still not improperly issuing contract changes. See *J.F. Allen Co. v. United States*, 25 Cl. Ct. 312 (1992) (directions issued by expert engineer were not contract changes because the contract specifically stated the work would be "as directed" by the government).
- C. Unauthorized Changes. Any contract change not made by the contracting officer is unauthorized. The contractor bears the responsibility of immediately notifying the contracting officer of the alleged change to confirm whether the government is officially ordering the change. (FAR 43.104)

## III. FORMAL CONTRACT MODIFICATIONS

- A. General. Any change executed in writing and made part of the contract file is a formal contract modification.
- B. Categories.

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<sup>1</sup> FAR 43.202 contains a limited authority for Contract Administration Offices to issue "Change Orders," unilateral contract changes pursuant to the contract's "changes clause." However, they may only do so upon proper delegation.

1. Administrative. These unilateral changes are made in writing by the contracting officer, and do not affect the substantive rights of the parties. FAR 43.101. These include:
  - a. Changes to appropriations data (to update for new fiscal years, etc.);
  - b. Changing points of contact or telephone numbers.
2. Substantive. These changes alter the terms and conditions of the contract in ways that affect the substantive rights of the parties by adding, deleting, or changing the work required and/or compensation authorized under the contract. These may be made unilaterally (for changes authorized by a changes clause) or bilaterally (with agreement between the two parties).

C. Methods.

1. Unilateral. The contracting officer may make certain changes to the contract without contractor agreement or negotiation prior to the change. These changes include those of an administrative nature or those authorized by the changes clause in that contract, and are executed using a **change order**.
  - a. **Changes Clauses** provide the contracting officer with authority to make certain unilateral contract changes. (FAR 43.201) Some main changes clauses include:
    - (1) **Fixed-Price Supply Contracts** – FAR 52.243-1. This clause authorizes changes to:
      - (a) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the Government in accordance with the drawings, designs, or specifications.
      - (b) Method of shipment or packing.
      - (c) Place of delivery.
    - (2) **Services** – FAR 52.243-1 ALTERNATE 1. This clause authorizes changes in:
      - (a) Description of services to be performed.
      - (b) Time of performance (i.e., hours of the day, days of the week, etc.).
      - (c) Place of performance of the services.



(3) **Construction** – FAR 52.244-4. This clause authorizes changes:

- (a) In the specifications (including drawings and designs);
- (b) In the method or manner of performance of the work;
- (c) In the Government-furnished property or services; or
- (d) Directing acceleration in the performance of the work.

b. Other Clauses Authorizing Unilateral Changes.

- (1) **Suspension of Work.** The contracting officer may unilaterally suspend work for the convenience of the government. However, if the delay is unreasonable, the contractor is entitled to an adjustment of the contract price, through a contract modification, to account for added expense. Note that suspensions of work may entitle the contractor to recover additional costs, but not profit (since the work has not changed). (FAR 52.242-14)
- (2) **Property Clause.** This clause gives the contracting officer broad power to unilaterally increase, decrease, substitute, or even withdraw government-furnished property. (FAR 52.245-1)
- (3) **Options Clause.** These clauses give the contracting officer the ability to unilaterally extend the contract, or order additional supplies/services. (FAR 52.217-4 thru FAR 52.217-9)
- (4) **Terminations.** The contracting officer can unilaterally terminate a contract for convenience or default (FAR 49.5)

2. **Bilateral.** As with any contract, the parties may agree to change the terms and conditions of the original contract. In such cases, the parties have actually created a supplemental agreement.<sup>2</sup> In government contracting, the parties can only agree to make changes within the scope of the original contract.

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<sup>2</sup> Per FAR 43.102, there is a general government preference for bilateral modifications rather than unilateral modifications.

- a. Differing Site Conditions. Contractors must “promptly notify the Contracting Officer, in writing, of subsurface or latent physical conditions differing materially from those indicated in this contract or unknown unusual physical conditions at the site before proceeding with the work.” The contracting officer must then pay an equitable adjustment to account for the conditions, though only when the contractor properly proposes the equitable adjustment. (FAR 52.236-2; 52.243-5)
  - b. Other In-Scope Changes. The parties may agree to a change that falls within the scope of the original contract.
- 3. Form and Procedure.
  - a. Required Form. The FAR prescribes the use of Standard Form (SF) 30, “Amendment of Solicitation/Modification of Contract,” for all contract modifications, both unilateral and bilateral. (FAR 43.301)
  - b. Timing. Changes may be made at any time prior to final payment on the contract. **Final Payment** is the last payment due under the contract, and the contractor must take the payment with the understanding that no more payments are due. See Design & Prod., Inc. v. United States, 18 Cl. Ct. 168 (1989); Gulf & Western Indus., Inc. v. United States, 6 Cl. Ct. 742 (1984).
  - c. Definitization. Any contract change likely requires an increase in the cost of performance. This amount must either be negotiated ahead of time, or a maximum allowable cost identified, unless impractical. (FAR 43.102(b)).
  - d. Fiscal Considerations. Proper appropriated funds must be available to fund any contract modification. Otherwise, availability of funds or price limitation clauses must be included. (FAR 43.105(a)).
  - e. Government Benefit. There must be some benefit to the government in order to justify a contract change. Northrop Grumman Computing Systems, Inc., GSBGA No. 16367, 2006-2 BCA ¶ 33,324.

#### IV. CONSTRUCTIVE CONTRACT CHANGES - GENERALLY.

- A. Background. Constructive changes exist whenever the government, through action or inaction, and whether intentionally or unintentionally, imposes a change to the terms and conditions of contract performance - but fails to do so formally (in writing or otherwise). Administration of Gov’t Contracts, Cibinic, Nash &

Nagle (2006, p. 427). In such cases, the contractor often argues the change entitles it to additional compensation or extension of performance period.<sup>3</sup> Upon receiving notice of the alleged constructive change, a contracting officer may respond in one of three ways:

1. Adopt the Change. The contracting officer may ratify the government's action/inaction and formally establish a contract modification. If so, the contracting officer must negotiate an equitable adjustment to account for any additional work. FAR 43.104(a)(1).
  2. Reject the Change. The contracting officer can simply disclaim unauthorized government conduct and absolve the contractor of following the unauthorized directions. FAR 43.104(a)(2).
  3. Adopt the Conduct, but Deny a Change Exists. In many cases the government's action/inaction may affect contractor performance, but the contracting officer may conclude that the original contract requires the performance at issue and that no change has occurred. These cases include the majority of contract changes litigation. FAR 43.104(a)(3)
- B. Three Basic Elements of Constructive Changes. Note that these three elements are generally applicable to all constructive change claims. Nevertheless, there are additional elements that the contractor must prove depending upon the "type" of constructive change alleged (See below). The *Sherman R. Smoot Corp.*, ASBCA Nos. 52173, 53049, 01-1 BCA ¶ 31,252 (appeal later sustained on other aspects of the case); *Green's Multi-Services, Inc.*, EBCA No. C-9611207, 97-1 BCA ¶ 28,649; *Dan G. Trawick III*, ASBCA No. 36260, 90-3 BCA ¶ 23,222.
1. A change occurred either as the result of government action or inaction. *Kos Kam, Inc.*, ASBCA No. 34682, 92-1 BCA ¶ 24,546;
  2. The contractor did not perform voluntarily. *Jowett, Inc.*, ASBCA No. 47364, 94-3 BCA ¶ 27,110; and
  3. The change resulted in an increase (or a decrease) in the cost or the time of performance. *Advanced Mech. Servs., Inc.*, ASBCA No. 38832, 94-3 BCA ¶ 26,964.

## **V. TYPES OF CONSTRUCTIVE CHANGES.**

- A. Five Types. There are five general types of constructive changes that comprise the majority of litigation on the subject, each of which will be dealt with in depth below:
1. Contract Interpretation (or Misinterpretation);

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<sup>3</sup> NOTE: Contractors are required to immediately notify the contracting officer when they believe a constructive change has occurred. See FAR 43.104

2. Defective Specifications;
  3. Governmental Interference and Failure to Cooperate;
  4. Failure to Disclose Vital Information (Superior Knowledge); and
  5. Constructive Acceleration.
- B. Contract Interpretation. This type of constructive change occurs when the contractor and the government disagree on how to interpret the terms of the contract. Often, the government insists that the contract terms require the work to be performed in a certain (usually more expensive) manner than the contractor's interpretation requires. See Ralph C. Nash, Jr. & Steven W. Feldman, *Government Contract Changes* 340 (3d ed. 2007). The contractor argues that the government misinterpreted the contract's requirements, resulting in additional work or costs that would not otherwise be reimbursed to the contractor.
1. Initial Concerns.
    - a. Before deciding how to properly interpret a contract term, the following preliminary issues must be examined:
      - (1) Did the government's disputed interpretation originate from an employee with authority to interpret the contract terms? See J.F. Allen Co. & Wiley W. Jackson Co., a Joint Venture v. United States, 25 Cl. Ct. 312 (1992). If not, there may be no genuine dispute over interpretation unless the contracting officer later adopts the unauthorized individuals' interpretation.
      - (2) Did the contractor perform any work that the contract did not require? If not, there may be no issue to resolve.
      - (3) Did the contractor timely notify the government of the impact of the government's interpretation? Ralph C. Nash, Jr., Government Contract Changes, 11-2 (2d ed. 1989).
    - b. Contractors must continue to perform all required work until disputes are resolved if those disputes arise "under the contract." FAR 52.233-1(i). Contractors bear the initial risk of non-performance pending the outcome. Therefore, contractors usually perform according to the requirements of a constructive change and file a claim for equitable adjustment or breach damages. Administration of Government Contracts, 431 - 5. See also Aero Prods. Co., ASBCA No. 44030, 93-2 BCA ¶ 25,868.
    - c. Contract Interpretation Generally.

- (1) Contract interpretation is an effort to discern the intent of the contracting parties by examining the language of the agreement they signed and their conduct before and after entering into the agreement. Once that intent is ascertained, the parties will generally be held to that intent. See Firestone Tire & Rubber Co. v. United States, 444 F.2d 547 (Ct. Cl. 1971).
- (2) Process. The first place to seek the intent of the parties is the **intrinsic evidence** - i.e. the four corners of the contract itself. If the contract terms are ambiguous (admitting of two or more reasonable meanings), the **extrinsic evidence** surrounding contract formation and administration may be examined. Also, some common-law doctrines of contract interpretation, including **contra proferentem** and the **duty to seek clarification** apply.

## 2. Intrinsic Evidence and Contract Interpretation.

- a. The first step to interpreting contract terms is to identify the **plain meaning** of a given term, as this is considered strong evidence of the intent of the parties. See Ahrens. v. United States, 62 Fed. Cl. 664 (2004).
- b. “When interpreting the language of a contract, a court must give reasonable meaning to all parts of the contract, and not render portions of the contract meaningless.” Big Chief Drilling Co. v. United States, 26 Cl. Ct. 1276, 1298 (1992).
- c. Defining Terms.
  - (1) Give ordinary terms their ordinary definitions. See Elden v. United States, 617 F.2d 254 (Ct. Cl. 1980);
  - (2) If the contract defines a term, use the definition contained in the contract itself. See Sears Petroleum & Transp. Corp., ASBCA No. 41401, 94-1 BCA ¶ 26,414.
  - (3) Give technical, scientific, or engineering terms their recognized technical meanings unless defined otherwise in the contract. See Western States Constr. Co. v. United States, 26 Cl. Ct. 818 (1992); Tri-Cor, Inc. v. United States, 458 F.2d 112 (Ct. Cl. 1972).
- d. Lists of Items. Lists of items are presumed to be exhaustive unless otherwise specified. Non-exhaustive lists are presumed to include only similar unspecified items.

- e. Orders of Precedence of Contract Terms. Contracts often contain “order of precedence” clauses to establish an order of priority between sections of the contract.
  - f. Drawings v. Specifications
    - (1) Non-Construction Contracts – **drawings** trump **specifications**. (FAR 52.215-8)
    - (2) Construction Contracts – (FAR 52.236-21)
      - (a) Anything in drawings and not specifications, or vice-versa, is given the same effect as if it were present in both;
      - (b) **Specifications** trump **drawings** if there is a difference between them;
      - (c) Any discrepancies can only be resolved by the contracting officer who must resolve the matter “promptly.”
  - g. **Patent ambiguities** in construction contracts may be resolved by applying the order of preference clauses in the contract. See Manuel Bros., Inc. v. U.S., 55 Fed. Cl. 8 (2002).
  - h. In construction contracts, the DFARS states that the contractor shall perform **omitted details** of work that are necessary to carry out the intent of the drawings and specifications or that are performed customarily. (DFARS 252.236-7001)
3. Extrinsic Evidence. Courts will only examine extrinsic evidence only if the intent of the parties cannot be ascertained from the contract’s terms. See Coast Federal Bank, FSB v. United States, 323 F.3d 1035 (Fed. Cir. 2003).
- a. Courts generally examine four main types, which will be discussed below:
    - (1) Pre-award communications;
    - (2) Actions during contract performance;
    - (3) Prior course of dealing;
    - (4) Custom, trade, or industry standard.

- b. Pre-Award Communications. During the solicitation period, an offeror may request clarification of the solicitation's terms, drawings, or specifications. Under the "Explanation to Prospective Bidders" clause, the government will respond in writing (oral explanations are not binding on the government) to all offerors. (FAR 52.214-6)
  - (1) Oral clarifications of ambiguous solicitation terms during pre-award communications are not generally binding on the government. However, if the government official making the clarification is vested with proper authority to make minor modifications to the solicitation, those clarifications may be binding. See Max Drill, Inc. v. United States, 192 Ct. Cl. 608, 427 F.2d 1233 (1970).
  - (2) Other statements made at pre-bid conferences may bind the government. See Cessna Aircraft Co., ASBCA No. 48118, 95-2 BCA ¶ 27,560, reversed, in part, by Dalton v. Cessna Aircraft Co., 98 F.3d 1298 (Fed. Cir. 1996) (finding that the Navy's statements at a pre-bid conference did not resolve a patent contractual ambiguity, so the contractor had a duty to clarify).
  - (3) Pre-award acceptance of a contractor's cost-cutting suggestion may also bind the government. See Pioneer Enters., Inc., ASBCA No. 43739, 93-1 BCA ¶ 25,395.
- c. Actions During Contract Performance. The parties to a contract often act in ways that illuminate their understanding of contract requirements. This may aid courts in discerning the understood meanings of ambiguous contract terms.
  - (1) Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight. Restatement, Second, Contracts § 202(4)(1981).
  - (2) To quote one judge, "in this inquiry, the greatest help comes, not from the bare text of the original contract, but from external indications of the parties' joint understanding, contemporaneously and later, of what the contract imported. [H]ow the parties act under the arrangement, before the advent of controversy is often more revealing than the dry language of the written agreement by itself." Macke Co. v. U.S., 467 F.2d 1323 (Ct. Cl. 1972).

- (3) Persistent acquiescence or non-objection may indicate that a contractor originally believed the disputed performance was actually part of the original contract, thus requiring no additional compensation. See Drytech, Inc., ASBCA No. 41152, 92-2 BCA 24,809; Tri-States Serv. Co., ASBCA No. 37058, 90-3 BCA ¶22,953.

d. Prior Course of Dealing.

- (1) If a contractor demonstrates a specific understanding of contract terms through its **history of dealing** with the government on the present or past contracts, that understanding may be binding. See Superstaff, Inc., ASBCA No. 46112, 94-1 BCA ¶ 26,574; Metric Constructors v. NASA, 169 F.3d 747 (Fed. Cir. 1999)
- (2) In some instances, **government waiver** of a contract term may demonstrate the intent of the parties not to follow that term. However, there must be many instances of waiver to establish this prior course of dealing. Thirty-six instances of waiver has been held to be sufficient. See LP Consulting Group v. U.S., 66 Fed. Cl. 238 (2005). However, six is not enough when the agency actively seeks to enforce the contract term in the present contract. See Gen. Sec. Servs. Corp. v. Gen. Servs. Admin., GSBCA No. 11381, 92-2 BCA ¶ 24,897.

e. Custom, Trade, or Industry Standard. Ambiguous contract terms may be interpreted through the lens of customary practice within that trade or industry. The following rules apply:

- (1) Parties may not use the extrinsic evidence of custom and trade usage to contradict unambiguous terms. See McAbee Const. Inc. v. U.S., 97 F.3d 1431, 1435 (Fed. Cir. 1996). See also All Star / SAB Pacific, J.V., ASBCA No. 50856, 99-1 BCA ¶ 30,214;
- (2) However, evidence of custom, trade, or industry standard may be used to demonstrate that an ambiguity exists in a contract term, if a party “reasonably relied on a competing interpretation . . .” of a contract term. Metric Constructors v. NASA, 169 F.3d 747, 752 (Fed. Cir. 1999);
- (3) The party asserting the industry standard or trade usage bears the burden of proving the existence of the standard or usage. Roxco, Ltd., ENG BCA No. 6435, 00-1 BCA ¶



30,687; DWS, Inc., Debtor in Possession, ASBCA No. 29743, 93-1 BCA ¶ 25,404.

4. Common-Law Doctrines.

- a. Contra-Proferentem. Latin for “against the offeror,” this common law doctrine of contract interpretation considers the drafting party (the offeror) to be in the best position to put what it truly means into the words of the contract. Thus, any ambiguities in the language that party drafted should be interpreted against them. See Keeter Trading Co., Inc. v. U.S., 79 Fed. Cl. 243 (2007); Rotech Healthcare v. U.S., 71 Fed. Cl. 393 (2006); Emerald Maint., Inc., ASBCA No. 33153, 87-2 BCA ¶ 19,907. Four requirements before applying contra proferentem:

- (1) The non-drafter’s interpretation must be **reasonable**. The interpretation’s reasonableness must be established with more than mere allegations of reasonableness. See Wilhelm Constr. Co., CBCA 719, Aug. 13, 2009.
- (2) The **opposing party** must be the drafter (i.e. not a third party). See Canadian Commercial Corp. v. United States, 202 Ct. Cl. 65 (1973).
- (3) The non-drafting party must have **detrimentally relied** on its interpretation in submitting its bid. The requirement for prebid reliance underscores the contractor’s obligation to establish actual damage as a prerequisite to recovery. See American Transport Line, Ltd., ASBCA No. 44510, 93-3 BCA ¶ 26,156 (1993) (finding no evidence to support the genuineness of a contractor’s self-serving statement of prebid reliance on a contract interpretation).
- (4) The ambiguity **cannot be patent** – otherwise, the contractor has the duty to clarify (see below).

b. Duty to Seek Clarification.

- (1) The law establishes the duty of clarification in order to ensure that the government will have the opportunity to clarify its requirements and thereby provide a level playing field to all competitors for the contract before contract award, and to avoid litigation after contract award. A contractor proceeds at its own risk if it relies upon its own interpretation of contract terms that it believes to be ambiguous instead of asking the government for a clarification. Wilhelm Constr. Co. v. Dep’t of Veterans Affairs, CBCA 719, 09-2 BCA ¶ 34228; Community

Heating & Plumbing Co. v. Kelso, 987 F.2d 1575 (Fed. Cir. 1993); Nielsen-Dillingham Builders, J.V. v. United States, 43 Fed. Cl. 5 (1999).

- (2) Do not apply contra proferentem if an ambiguity is patent and the contractor failed to seek clarification. See Triax Pacific, Inc. v. West, 130 F.3d 1469 (Fed. Cir. 1997).
- (3) Latent v. Patent Ambiguities.
  - (a) Latent Ambiguity. An ambiguity that does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed. Black's Law Dictionary, 1999. See Foothill Eng'g., IBCA No. 3119-A, 94-2 BCA ¶ 26,732 (the misplacement of a comma in a figure was a latent ambiguity and did not trigger a duty to inquire, because it was not obvious and apparent in the context of a reasonable, but busy, bidder).
  - (b) Patent Ambiguity. An ambiguity that clearly appears on the face of a document, arising from the language, itself. Black's Law Dictionary, 1999.
    - (i) An ambiguity is patent if it would have been apparent to a reasonable person in the claimant's position or if the provisions conflict on their face. Patent ambiguities are "obvious, gross, (or) glaring." Grumman Data Systems Corp. v. Dalton, 88 F.3d 990 (1996); H&M Moving, Inc. v. United States, 499 F.2d 660, 671 (Ct. Cl. 1974). See White v. Edsall Constr. Co., Inc., 296 F.3d 1081 (2002) (holding that a note disclaiming the government's warranty on one of several dozen design drawings was patent ambiguity). "A patent ambiguity is one which is so clearly evident, obvious or glaring that a reasonable man would be impelled by his own good sense, if not his conscience, to ask a question." American Transport Line, Ltd., ASBCA No. 44510, 93-3 BCA ¶ 26,156 (1993).
    - (ii) A determination of what constitutes a patent ambiguity is made on a case-by-case basis

given the facts in each contractual situation. Whether an ambiguity is patent or latent is a question of law. *Wilhelm Constr. Co.*, CBCA 719, Aug. 13, 2009; *Interstate General Gov't Contractors, Inc. v. Stone*, 980 F.2d 1433 (Fed. Cir. 1992); *H.B. Zachry Co. v. United States*, 28 Fed. Cl. 77 (1993), *aff'd*, 17 F.3d 1443 (Fed. Cir. 1994)(table). See *Hensel Phelps Constr. Co.*, ASBCA No. 49716, 00-2 BCA ¶ 30,925 (holding that an objective standard applied to the latent/patent ambiguity determination).

C. Defective Specifications.

1. Based on an analysis of acceptable risk and government requirements, government contracts may include four types of specifications:
  - a. **DESIGN SPECIFICATIONS** set forth precise measurements, tolerances, materials, tests, quality control, inspection requirements, and other specific information. See *Apollo Sheet Metal, Inc., v. United States*, 44 Fed. Cl. 210 (1999); *Q.R. Sys. North, Inc.*, ASBCA No. 39618, 92-2 BCA ¶ 24,793 (specified roofing material inadequate for roof type)
    - (1) The key issue is whether the government required the contractor to use detailed specifications. *Geo-Con, Inc.*, ENG BCA No. 5749, 94-1 BCA ¶ 26,359. Nonconformity to design specifications result in a contract price reduction. *Donat Gerg Haustechnik*, ASBCA Nos. 41197, 42001, 42821, 47456, 97-2 BCA ¶ 29,272.
    - (2) The government is responsible for design and related omissions, errors, and deficiencies in the specifications and drawings. *White v. Edsall Constr. Co., Inc.*, 296 F.3d 1081 (2002); *Apollo Sheet Metal, Inc., v. United States*, 44 Fed. Cl. 210 (1999); *Neal & Co. v. United States*, 19 Cl. Ct. 463 (1990) (defective design specifications found to cause bowing in wall); *International Foods Retort Co.*, ASBCA No. 34954, 92-2 BCA ¶ 24,994 (bland chicken ala king). But see *Hawaiian Bitumuls & Paving v. United States*, 26 Cl. Ct. 1234 (1992) (contractor may vitiate warranty by participating in drafting and developing specifications).
    - (3) The constructive change theory of defective specifications only applies to “design” specifications (or to the “design” portion of “composite specifications”).

- b. **PERFORMANCE SPECIFICATIONS** set forth the operational characteristics desired for the item. In such specifications, design, measurements, and other specific details are neither stated nor considered important as long as the performance requirement is met. See Apollo Sheet Metal, Inc., v. United States, 44 Fed. Cl. 210 (1999); Interwest Constr. v. Brown, 29 F.3d 611 (Fed. Cir. 1994).
- (1) If the government uses a performance specification, the contractor accepts general responsibility for the design, engineering, and achievement of the performance requirements. Apollo Sheet Metal, Inc., v. United States, 44 Fed. Cl. 210 (1999); Blake Constr. Co. v. United States, 987 F.2d 743 (Fed. Cir. 1993); Technical Sys. Assoc., Inc., GSBICA Nos. 13277-COM, 14538-COM, 00-1 BCA ¶ 30,684.
  - (2) The contractor has discretion as to the details of the work, but the work is subject to the government's right of final inspection and approval or rejection. Kos Kam, Inc., ASBCA No. 34682, 92-1 BCA ¶ 24,546.
- c. **PURCHASE DESCRIPTIONS** are specifications that designate a particular manufacturer's model, part number, or product. The phrase "or equal" may accompany a purchase description. M.A. Mortenson Co., ASBCA Nos. 50716, 51241, 51257, 99-1 BCA ¶ 30,270; Monitor Plastics Co., ASBCA No. 14447, 72-2 BCA ¶ 9626.
- (1) If the contractor furnishes or uses in fabrication a specified brand name or an acceptable and approved substitute brand-name product, the responsibility for proper performance generally falls upon the government.
  - (2) The government's liability is conditioned upon the contractor's correct use of the product.
  - (3) If the contractor elects to manufacture an equal product, it must ensure that the product is equal to the brand name product.
- d. **COMPOSITE SPECIFICATIONS** are specifications that are comprised of two or more different specification types. See Defense Sys. Co., Inc., ASBCA No. 50918, 00-2 BCA ¶ 30,991; Transtechology, Corp., Space Ordnance Sys. Div. v. United States, 22 Cl. Ct. 349 (1990).

- (1) If the government uses a composite specification, the parties must examine each portion of the specification to determine which specification type caused the problem. This determination establishes the scope of the government's liability. Aleutian Constr. v. United States, 24 Cl. Ct. 372 (1991); Penguin Indus. v. United States, 530 F.2d 934 (Ct. Cl. 1976). Cf. Hardwick Bros. Co., v. United States, 36 Fed. Cl. 347 (Fed. Cl. 1996) (since mixed specifications were primarily performance-based, there is no warranty covering the specifications).
- (2) The contractor must isolate the defective element of the design portion or demonstrate affirmatively that its performance did not cause the problem. Defense Sys. Co., Inc., ASBCA No. 50918, 00-2 BCA ¶ 30,991 (finding that contractor failed to demonstrate deficient fuses were due to deficient Government design rather than production problems).

2. Scope of Government Liability for Defective Specifications. The government's liability varies based on the type of specification included in the contract as follows:

Type of Specification	Description	Risk Allocation
Design Specification	If the Gov't provides and requires use of design specifications, the Gov't gives an implied warranty that specifications are free of defects.	Gov't assumes the risk of defective design specifications
Performance Specifications	Gov't only specifies performance objectives	Contractor bears responsibility for design and success of that design
Purchase Specifications	Gov't provides specifications necessary to identify required product/item to be purchased or used by contractor during performance	If gov't specifies and Ktr uses properly, gov't bears the risk; if Ktr uses improperly, Ktr may be liable if incorrect use caused failure.
Composite Specifications	Identify the type of specification	See above...

3. Defective Specifications - Theory of Recovery - Implied Warranty of Design.

- a. Basis.
  - (1) This “warranty” is based on an implied promise by the government that a contractor can follow the contract drawings and specifications and perform without undue expense. This promise has been called a warranty; however, recovery is based on a breach of the duty to provide drawings and specifications reasonably free from defects. White v. Edsall Constr. Co., Inc., 296 F.3d 1081 (2002); Fru-Con Constr. Corp. v. United States, 42 Fed. Cl. 94 (1998) (reconsidered on other grounds); United States v. Spearin, 248 U.S. 132 (1918); Luria Bros. & Co. v. United States, 177 Ct. Cl. 676, 369 F.2d 701 (1966).
  - (2) Defective (**design**) specifications may result in a constructive change. See, e.g., Hol-Gar Mfg. Corp. v. United States, 175 Ct. Cl. 518, 360 F.2d 634 (1964). In some cases, judges have relied on a breach of contract theory. See, e.g., Big Chief Drilling Co. v. United States, 26 Cl. Ct. 1276 (1992).
- b. Recovery. See Transtechnology, Corp., Space Ordnance Sys. Div. v. United States, 22 Cl. Ct. 349 (1990).
  - (1) To recover under the implied warranty of specifications, the contractor must prove that:
    - (a) It reasonably relied upon the defective (design) specifications and complied fully with them. Phoenix Control Sys., Inc. v. Babbitt, Secy. of the Interior, 1997 U.S. App. LEXIS 8085 (Fed. Cir. 1997); Fruin-Colnon Corp. v. U.S., 912 F.2d 1426 (Fed. Cir 1990) (reasonably relied on its interpretation in submitting its bid on proposal); Al Johnson Constr. Co. v. United States, 854 F.2d 467 (Fed. Cir. 1988); Gulf & Western Precision Eng’g Co. v. United States, 543 F.2d 125 (Ct. Cl. 1976); Mega Constr. Co., 29 Fed. Cl. 396 (1993); Bart Assocs., Inc., EBCA No. C-9211144, 96-2 BCA ¶ 28,479; and
    - (b) That the defective (design) specifications caused increased costs. McElroy Mach. & Mfg. Co., Inc., ASBCA No. 46477, 99-1 BCA ¶ 30,185; Pioneer Enters., Inc., ASBCA No. 43739, 93-1 BCA ¶ 25,395 (contractor failed to demonstrate that defective specification caused its delay); Chaparral

Indus., Inc., ASBCA No. 34396, 91-2 BCA ¶ 23,813, aff'd, 975 F.2d 870 (Fed. Cir. 1992).

- (2) The contractor cannot recover if it has actual or constructive knowledge of the defects prior to award. M.A. Mortenson Co., ASBCA Nos. 50716, 51241, 51257, 99-1 BCA ¶ 30,270; Centennial Contractors, Inc., ASBCA No. 46820, 94-1 BCA ¶ 26,511; L.W. Foster Sportswear Co. v. United States, 405 F.2d 1285 (Ct. Cl. 1969) (contractor had actual knowledge from prior contract). Generally, constructive knowledge is limited to patent errors because a contractor has no duty to conduct an independent investigation to determine whether the specifications are adequate. Jordan & Nobles Constr. Co., GSBCA No. 8349, 91-1 BCA ¶ 23,659. Cf. Spiros Vasilatos Painting, ASBCA No. 35065, 88-2 BCA ¶ 20,558 (appealed, modified on other grounds).
  - (3) A contractor may not recover if it decides unilaterally to perform work knowing that the specifications were defective. Ordnance Research, Inc. v. United States, 221 Ct. Cl. 641, 609 F.2d 462 (1979).
  - (4) A contractor may not recover if it fails to give timely notice that it was experiencing problems without assistance of the government. McElroy Mach. & Mfg. Co., Inc., ASBCA No. 46477, 99-1 BCA ¶ 30,185; JGB Enters., Inc., ASBCA No. 49493, 96-2 BCA ¶ 28,498.
  - (5) The government may disclaim this warranty. See, e.g., Serv. Eng'g Co., ASBCA No. 40272, 92-3 BCA ¶ 25,106 (reconsideration motion granted; decision modified, in part, on other grounds); Bethlehem Steel Corp., ASBCA No. 13341, 72-1 BCA ¶ 9186. The disclaimer must be obvious and unequivocal, however, in order to shift the risk to the contractor. White v. Edsall Constr. Co., Inc., 296 F.3d 1081 (2002) (holding that a small note disclaiming the government's warranty found on one of several dozen design drawings was hidden and not obvious).
4. Defective Specifications - Theory of Recovery – Impracticability/Impossibility of Performance.
- a. **Three Elements.** American Mechanical, Inc., ASBCA No. 52033, 03-1 BCA ¶ 32,134; Oak Adec, Inc. v. United States, 24 Cl. Ct. 502 (1991); Reflectone, Inc., ASBCA No. 42363, 98-2 BCA ¶

28,869; Gulf & Western Indus., Inc., ASBCA No. 21090, 87-2 BCA ¶ 19,881.

- (1) An Unforeseen or Unexpected occurrence.
  - (a) A significant increase in work usually caused by unforeseen technological problems. Examine the following factors to determine whether a problem was unforeseen or unexpected:
    - (i) The nature of the contract and specifications, i.e., whether they require performance beyond the state of the art;
    - (ii) The extent of the contractor's effort; and
    - (iii) The ability of other contractors to meet the specification requirements.
  - (b) In some cases, a contractor must show that an extensive research and development effort was necessary to meet the specifications or that no competent contractor can meet the performance requirements. Hol-Gar Mfg. Corp. v. United States, 360 F.2d 634 (Ct. Cl. 1964); Reflectone, Inc., ASBCA No. 42363, 98-2 BCA ¶ 29,869 (contractor must show specifications "required performance beyond the state of the art" to demonstrate impossibility); Defense Sys. Corp. & Hi-Shear Tech. Corp., ASBCA No. 42939, 95-2 BCA ¶ 27,721.
- (2) The contractor did not assume the risk of the unforeseen occurrence by agreement or custom. RNJ Interstate Corp. v. United States, 181 F.3d 1329 (Fed. Cir. 1999) (holding that doctrine of impossibility did not apply to a worksite fire since the contract placed the risk of loss on the contractor until acceptance by the government); Southern Dredging Co., ENG BCA No 5843, 92-2 BCA ¶ 24,886; Fulton Hauling Corp., PSBCA No. 2778, 92-2 BCA ¶ 24,858.
  - (a) A contractor may assume the risk of the unforeseen effort by using its own specifications. Short Bros., PLC v. U.S., 65 Fed. Cl. 695 (2005); Costal Indus. v. United States, 32 Fed. Cl. 368 (1994) (use of specification drafted, in part, by contractor's supplier held to be assumption of risk); Technical



Sys. Assoc. Inc., GSBCA Nos. 13277-COM, 14538-COM, 00-1 BCA ¶ 30,684.

- (b) By proposing to extend the state of the art, a contractor may assume the risk of impossible performance. See J.A. Maurer, Inc. v. United States, 485 F.2d 588 (Ct. Cl. 1973).
- (3) Performance is commercially impracticable or impossible.
- (a) The contractor must show that the increased cost of performance is so much greater than anticipated that performance is commercially senseless. See Fulton Hauling Corp., PSBCA No. 2778, 92-2 BCA ¶ 24,858; Technical Sys. Assoc. Inc., GSBCA Nos. 13277-COM, 14538-COM, 00-1 BCA ¶ 30,684; McElroy Mach. & Mfg. Co., Inc., ASBCA No. 46477, 99-1 BCA ¶ 30,185. But see SMC Info. Sys., Inc. v. Gen. Servs. Admin., GSBCA No. 9371, 93-1 BCA ¶ 25,485 (the increased difficulty cannot be the result of poor workmanship).
  - (b) There is no universal standard for determining “commercial senselessness.”
    - (i) Courts and boards sometimes use a “willing buyer” test to determine whether the increased costs render performance commercially senseless. A showing of economic hardship on the contractor is insufficient to demonstrate “commercial senselessness.” The contractor must show that there are no buyers willing to pay the increased cost of production plus a reasonable profit. Ralph C. Nash, Jr., Government Contract Changes, 13-37 to 13-39 (2d ed. 1989).
    - (ii) Some decisions have stated that it must be “positively unjust” to hold the contractor liable for the increased costs. Raytheon Co., ASBCA Nos. 50166, 50987, 01-1 BCA ¶ 31,245 (57% increase insufficient) *appealed, vacated, in part, on other grounds at* 305 F.3d 1354 (Fed. Cir. 2002); Weststates Transp. Inc., PSBCA No. 3764, 97-1 BCA ¶ 28,633; Gulf & Western Indus., Inc.,

ASBCA No. 21090, 87-2 BCA ¶ 19,881 (70% increase insufficient); HLI Lordship Indus., VABCA No. 1785, 86-3 BCA ¶ 19,182 (200% increase in gold prices insufficient). But see Xplo Corp., DOT BCA No. 1289, 86-3 BCA ¶ 19,125 (50% increase in costs was sufficient).

D. Interference and Failure to Cooperate.

1. General Theory of Recovery.

- a. Contracting activities have an implied obligation to cooperate with their contractors and not to administer the contract in a manner that hinders, delays, or increases the cost of performance.

Cases: Precision Pine & Timber, Inc. v. United States, 50 Fed. Cl. 35, 65-70 (2001) (holding that the Forest Service breached a timber sale contract by suspending the contractor's logging operations when the Mexican spotted owl was listed as an endangered species instead of consulting with the Fish and Wildlife Service and developing a management plan as was required by the ESA) (case later reconsidered, modified judgment entered on other grounds); Coastal Gov't Serv., Inc., ASBCA No. 50283, 01-1 BCA ¶ 31,353; R&B Bewachungsgesellschaft GmbH, ASBCA No. 42213, 91-3 BCA ¶ 24,310 (cost and fees proceeding on remand); C.M. Lowther, Jr., ASBCA No. 38407, 91-3 BCA ¶ 24,296. *See also* Restatement (Second) of Contracts, § 205 (1981) (description of bad faith practices during administration of the contract).

- b. Generally a contractor may not recover for "interference" that results from a sovereign act.

Cases: *See* Hills Materials Co., ASBCA No. 42410, 92-1 BCA ¶ 24,636, *rev'd sub nom.*, Hills Materials Co. v. Rice, 982 F.2d 514 (Fed. Cir. 1992); Orlando Helicopter Airways, Inc. v. Widnall, 51 F.3d 258 (Fed. Cir. 1995) (holding that a criminal investigation of the contractor was a noncompensable sovereign act); Henderson, Inc., DOT BCA No. 2423, 94-2 BCA ¶ 26,728 (limitation on dredging period created implied warranty); R&B Bewachungsgesellschaft GmbH, 91-3 BCA ¶ 24,310 (criminal investigators took action in government's contractual capacity, not sovereign capacity) (cost and fees proceeding on remand). *See also* Hughes Communications Galaxy, Inc. v. United States, 998 F.2d 953 (Fed. Cir. 1993) (holding that the government may waive sovereign act defense); Oman-Fischbach Int'l, a Joint Venture, ASBCA No. 44195, 00-2 BCA ¶ 31,022 (actions of a separate sovereign were not compensable constructive changes).

2. Bases for Interference Claims.

- a. Overzealous inspection of the contractor's work. Neal & Co., Inc. v. United States, 36 Fed. Cl. 600 (1996) ("nit-picking punch list" held to be overzealous inspection); WRB Corp. v. United States, 183 Ct. Cl. 409 (1968); Adams v. United States, 175 Ct. Cl. 288, 358 F.2d 986 (1966).

- b. Incompetence of government personnel. Harvey C. Jones, Inc., IBCA No. 2070, 90-2 BCA ¶ 22,762.
  - c. Water seepage or flow caused by the government. See C.M. Lowther, Jr., ASBCA No. 38407, 91-3 BCA ¶ 24,296 (water from malfunctioning sump pump was interference); Caesar Constr., Inc., ASBCA No. 41059, 91-1 BCA ¶ 23,639 (government's failure to remove snow piles which resulted in water seepage constituted a breach of its implied duty not to impede the contractor's performance).
  - d. Disruptive criminal investigations conducted in the government's contractual capacity. R&B Bewachungsgesellschaft GmbH, 91-3 BCA ¶ 24,310.
3. Bases for Failure to Cooperate Claims. The government must cooperate with a contractor. See, e.g., Whittaker Elecs. Sys. v. Dalton, Secy. of the Navy, 124 F.3d 1443 (Fed. Cir. 1997); James Lowe, Inc., ASBCA No. 42026, 92-2 BCA ¶ 24,835; Mit-Con, Inc., ASBCA No. 42916, 92-1 CPD ¶ 24,539. Bases for claims include:
- a. Failure to provide assistance necessary for efficient contractor performance. Chris Berg, Inc. v. United States, 197 Ct. Cl. 503, 455 F.2d 1037 (1972) (implied requirement); Durocher Dock & Dredge, Inc., ENG BCA No. 5768, 91-3 BCA ¶ 24,145 (failure to contest sheriff's stop work order was not failure to cooperate); Hudson Contracting, Inc., ASBCA No. 41023, 94-1 BCA ¶ 26,466; Packard Constr. Corp., ASBCA No. 46082, 94-1 BCA ¶ 26,577.
  - b. Failure to prevent interference by another contractor. Examine closely the good faith effort of the government to administer the other contract to reduce interference. Northrup Grumman Corp. v. United States, 47 Fed. Cl. 20 (2000); Stephenson Assocs., Inc., GSBCA No. 6573, 86-3 BCA ¶ 19,071.
  - c. Failure to provide access to the work site. Summit Contractors, Inc. v. United States, 23 Cl. Ct. 333 (1991) (absent specific warranty, site unavailability must be due to government's fault); Atherton Constr., Inc., ASBCA No. 48527, 00-2 BCA ¶ 30,968; R.W. Jones, IBCA No. 3656-96, 99-1 BCA ¶ 30,268; Old Dominion Sec., ASBCA No. 40062, 91-3 BCA ¶ 24,173, *recons. denied*, 92-1 BCA ¶ 24,374 (failure to grant security clearances); M.A. Santander Constr., Inc., ASBCA No. 35907, 91-3 BCA ¶ 24,050 (interference excused default); Reliance Enter., ASBCA No. 20808, 76-1 BCA ¶ 11,831.

- d. Abuse of discretion in the approval process. When the contract makes the precise manner of performance subject to approval by the contracting officer, the duty of cooperation requires that the government approve the contractor's methods unless approval is detrimental to the government's interest. Ralph C. Nash, Jr., Government Contract Changes 12-7 (2d ed. 1989). Common bases for claims are:
- (1) Failure to approve substitute items or components that are equal in quality and performance to the contract requirements. Page Constr. Co., AGBCA No. 92-191-1, 93-3 BCA ¶ 26,060; Bruce-Anderson Co., ASBCA No. 29411, 88-3 BCA ¶ 21,135 (contracting officer gave no explanation for refusal).
  - (2) Unjustified disapproval of shop drawings or failure to approve within a reasonable time. Orlosky, Inc. v. U.S., 68 Fed. Cl. 296 (2005); Vogt Bros. Mfg. Co. v. United States, 160 Ct. Cl. 687 (1963).
  - (3) Improper failure to approve the substitution or use of a particular subcontractor. Lockheed Martin Tactical Aircraft Sys., ASBCA Nos. 49530, 50057, 00-1 BCA ¶ 30,852, *recon. denied*, 00-2 BCA ¶ 30,930; Manning Elec. & Repair Co. v. United States, 22 Cl. Ct. 240 (1991); Hoel-Steffen Constr. Co. v. United States, 231 Ct. Cl. 128, 684 F.2d 843 (1982); Liles Constr. Co. v. United States, 197 Ct. Cl. 164, 455 F.2d 527 (1972); Richerson Constr., Inc. v. Gen. Servs. Admin., GSBCA No. 11161, 93-1 BCA ¶ 25,239. *Cf.* FAR 52.236-5, Material and Workmanship.

E. Constructive Acceleration.

1. General. If a contractor encounters an excusable delay, it is entitled to an extension of the contract schedule. Constructive acceleration occurs when the contracting officer refuses to recognize a new contract schedule and demands that the contractor complete performance within the original contract period.
2. Elements of Constructive Acceleration. Fru-Con Constr. Corp. v. United States, 43 Fed. Cl. 306 (1999); Atlantic Dry Dock Corp., ASBCA Nos. 42609, 42610, 42611, 42612, 42613, 42679, 42685, 42686, 44472, 98-2 BCA ¶ 30,025; Trepte Constr. Co., ASBCA No. 28555, 90-1 BCA ¶ 22,595.
  - a. The existence of one or more excusable delays;

- b. Notice by the contractor to the government of such delay, and a request for an extension of time;
  - c. Failure or refusal by the government to grant the extension request;
  - d. An express or implied order by the government to accelerate; and
  - e. An actual acceleration resulting in increased costs.
3. Excusable Delays. FAR 52.249-8, -9, -10, 14; FAR 52.212-4(f). See also Outline on Terminations for Default.
- a. An excusable delay is a delay which is beyond the control, fault or negligence of both the contractor and the subcontractor. The focus of the determination of "excusable delay" turns on the issue of foreseeability. General Injectables & Vaccines, Inc. v. Secretary of Defense, CAFC No 2007-1119, June 3, 2008, pg. 4.
  - b. Examples: Embargoes, fires, floods, strikes, sovereign acts, and unusually severe weather.
  - c. Subcontractors. The general rule is a delay in a subcontract does not excuse a prime contractor from performing on time unless the subcontractor's difficulty itself resulted from a delay that would be excusable under the contract. The rationale for this rule is that the prime contractor should not be placed in a better position, risk or liability wise, if the prime subcontracts the work rather than performing the work itself. General Injectables & Vaccines, Inc. v. Secretary of Defense, CAFC No. 2007-1119, June 3, 2008 (holding that a prime contractor was not excused under the sovereign act exception when the FDA refused to allow its subcontractor's to ship vaccine into the country because it was contaminated with bacteria); Johnson Mgmt. Group CFC, Inc. v. Martinez, 308 F.3d 1245, 1252 (Fed. Cir. 2002)("A contractor is responsible for the unexcused performance failures of its subcontractors").
  - d. Common Carriers. Generally, a delay of a common carrier is among the conditions that constitute a valid excusable delay because a common carrier delay is considered beyond the reasonable control of the contractor. A common carrier is not considered a sub-contractor. FAR 52.212-4(f). H.B. Nelson Construction Co. v. United States, 87 Ct. Cl. 375 (1938); Malan Construction Corp., VABCA No. 262, 1960 WL 151 (June 17, 1960); General Injectables & Vaccines, Inc. v. Secretary of Defense, CAFC No. 2007-1119, June 3, 2008.
4. Examples of Constructive Acceleration.

- a. The government threatens to terminate when the contractor encounters an excusable delay. Intersea Research Corp., IBCA No. 1675, 85-2 BCA ¶ 18,058;
- b. The government threatens to assess liquidated damages and refuses to grant a time extension. Fraser Constr. Co. v. U.S., 384 F.3d 1354 (Fed. Cir. 2004); Norair Eng'g Corp. v. United States, 666 F.2d 546 (Ct. Cl. 1981); Unarco Material Handling, PSBCA No. 4100, 00-1 BCA ¶ 30,682; or
- c. The government delays approval of a request for a time extension. Fraser Constr. Co. v. U.S., 384 F.3d 1354 (Fed. Cir. 2004); Fishbach & Moore Int'l Corp., ASBCA No. 18146, 77-1 BCA ¶ 12,300, aff'd, 617 F.2d 223 (Ct. Cl. 1980). *But see* Franklin Pavlov Constr. Co., HUD BCA No. 93-C-13, 94-3 BCA ¶ 27,078 (mere denial of delay request due to lack of information not tantamount to government order to accelerate).
- d. Note: The contractor's acceleration efforts need not be successful; a reasonable attempt to meet a completion date is sufficient. Unarco Material Handling, PSBCA No. 4100, 00-1 BCA ¶ 30,682; Fermont Div., Dynamics Corp., ASBCA No. 15806, 75-1 BCA ¶ 11,139.

5. Measure of Damages.

- a. The measure of recovery will be the difference between:
  - (1) The reasonable costs attributable to acceleration or attempting to accelerate; and
  - (2) The lesser costs the contractor reasonably would have incurred absent its acceleration efforts; plus
  - (3) A reasonable profit on the above-described difference.
- b. Common acceleration costs.
  - (1) Increased labor costs;
  - (2) Increased material cost due to expedited delivery; and
  - (3) Loss of efficiency or productivity. A method to compute this cost is to compare the work accomplished per labor hour or dollar during an acceleration period with the work accomplished per labor hour or dollar during a normal period. *See* Ralph C. Nash, Jr., Government Contract Changes, 18-16 and 18-17 (2d ed. 1989).

## VI. DETERMINING THE SCOPE OF A CHANGE.

- A. Generally. All modifications must be within the overall scope of the contract. Also, unilateral modifications must be authorized by the applicable changes clause as discussed in Section III above.
- B. Two Perspectives. The scope analysis asks different questions when looked at from the two major forums available to litigate contract modifications:
  - 1. Bid Protest Forum. When a 3<sup>rd</sup> party competitor protests to GAO that the government made an out-of-scope contract modification, the main question asked is whether the modification changed the “scope of competition.”
  - 2. Contract Dispute Forum. When an incumbent contractor alleges that the government made an out-of-scope contract modification, the main question is whether the new work was reasonably within the contemplation of the parties when they entered into the original contract – and consequently, whether the field of competition would have been different had the original contract included the new work.
- C. Scope Determinations in **Bid Protests**.
  - 1. The Government Accountability Office (GAO) has jurisdiction over bid protests, but will only review contract modifications if the protestor alleges the modification is out-of-scope.
    - a. Once a contract is awarded, GAO will generally not review modifications to that contract, because such matters are related to contract administration. They are beyond the scope of GAO’s bid protest function. *See* Bid Protest Regulations, 4 C.F.R. § 21.5(a) (2011).
    - b. An exception exists to GAO’s restriction on reviewing contract administration matters if the protestor alleges that the modification is out-of-scope of the original contract because, absent a valid sole-source determination (see FAR 6.302), the work covered by the modification would be subject to the statutory requirements for competition. Engineering & Prof’l Servs., Inc., B-289331, Jan. 28, 2002, 2002 CPD ¶ 24 at 3.
  - 2. The basis for a contract modification bid protest is the Competition in Contracting Act (CICA). 41 U.S.C. § 3306(a)(1)(A) (2011). The CICA, as implemented in Part 6 of the FAR, requires agencies to compete contract requirements to the greatest extent practical. Any modification made to a contract that exceeds the scope of the original contract

represents a new requirement that should be competed. Any out-of-scope modification is essentially an improper sole-source contract award.

3. Scope of Competition Test. The GAO applies the following test to determine whether a change is within the general scope of the contract:
  - a. Did the modification so materially alter the contract that the *field of competition* for the contract, as modified, would be significantly different from that obtained for the original contract, as awarded? Krykowski Const. Co., Inc. v. U.S., 94 Fed.3d 1537 (Fed. Cir. 1996); H.G. Properties A. LP v. U.S., 68 Fed. Appx. 192 (Fed. Cir. 2003).
  - b. Restated: Should offerors (prior to award) have reasonably anticipated this type of Contract Change based upon what was in the solicitation? A modification falls within the scope of the original procurement if potential offerors would have reasonably anticipated such a change prior to initial award. AT&T Communications, Inc. v. Wiltel, Inc., 1 F.3d 1201, 1205 (Fed. Cir. 1993) (stating a modification generally falls within the scope of the original procurement if potential bidders would have expected it to fall within the contract's changes clause).
  - c. A modification falls within the scope of the original contract if the solicitation for the original contract adequately advised offerors of the potential for the type of change found in the modification. DOR Biodefense, Inc.; Emergent BioSolutions, B-296358.3; B-298358.4, Jan. 31, 2006, 2006 CPD ¶ 35 at 6.
  - d. To determine whether a modification triggers the competition requirements in CICA, GAO looks to whether there is a material difference between the modified contract and the contract that was originally awarded. MCI Telecomms. Corp., B-276659.2, Sept. 29, 1997, 97-2 CPD ¶ 90 at 7.
  - e. Evidence of a material difference between the modification and the original contract is found by examining any changes in the following:
  - f. The type of work;
    - (1) The performance period;
    - (2) The costs between the contract as awarded and as modified; and
    - (3) Whether the agency had historically procured services under a separate contract. Atlantic Coast Contracting, Inc.,



B-2889693.4, June 21, 2002, 2002 CPD ¶ 104 at 4; Hughes Space and Communications Co., B-276040, 97-1 CPD ¶ 158.

4. Result. If GAO finds a contract modification is outside the scope of the contract, GAO may recommend that the government terminate the modification and then issue a solicitation for a separate contract for this work.

D. Scope Determinations in **Contract Disputes**.

1. The Boards of Contract Appeals (BCAs) have jurisdiction to review contract modifications through the Contract Disputes Act if the dispute “arises under” the contract per the Disputes Clause contained in the contract. (FAR 33.215 and 52.233-1; 41 U.S.C. §§ 7101-7108)
2. Contemplation of the Parties Test. Should the contract, as modified, “be regarded as having been fairly and reasonably within the contemplation of the parties when the contract was entered into?”
  - a. See Freund v. United States, 260 U.S. 60 (1922); Shank- Artukovich v. U.S., 13 Cl. Ct. 346 (1986); Air-A-Plane Corp. v. United States, 408 F.2d 1030 (Ct. Cl. 1969); GAP Instrument Corp., ASBCA No. 51658, 01-1 BCA ¶ 31,358; Gassman Corp., ASBCA Nos. 44975, 44976, 00-1 BCA ¶ 30,720.
  - b. Restated: Is the contract, as modified, for essentially the same work as the parties originally bargained for?
3. Result. If the court or board finds a contract modification to be outside the scope of the contract (i.e. a “cardinal change”), then:
  - a. The contractor is not required to perform the work, and
  - b. The contractor may be entitled to **breach damages**.
    - (1) NOTE: If the contractor performs the out-of-scope work, the contractor is limited to an equitable adjustment pursuant to the changes clause. The contractor who performs the work is not entitled to breach damages.
  - c. See Cities Service Helix v. U.S., 211 Ct. Cl. 222 (1976) (stating that if the government contract modification results in a material breach, then the contractor may elect to either perform or not to perform). See Also Dow Chemical Co. v. U.S., 226 F.3d 1334 (Fed. Cir. 2000). E. L. Hamm & Assocs., Inc., ASBCA No. 43792, 94-2 BCA ¶ 26,724 (holding that that because the Navy’s modification of a lease contract –which transformed the contract

into a purchase contract—was beyond the scope of the contract, the contractor could be entitled to “breach damages”). *See also*, Amerutex Enter., Ltd. v. United States, 1997 U.S. App. LEXIS 3301 (Fed. Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998). Nevertheless, if the contractor elects to perform a contract modification, the contractor cannot later prevail on a contract claim for material breach of contract. Amerutex Enter., Ltd. Once the contractor chooses to perform a modification, the contractor has, in fact, waived its material breach claim. *Id.*

E. **Common Scope Factors** (applied to all scope determinations). The following four factors are used to evaluate both bid protests and contract disputes that allege the existence of an out-of-scope contract modification. These factors must be weighed individually and in conjunction with each other to determine if a modification is out-of-scope.

1. Changes in the Function of the Item or the Type of Work.

a. In determining the materiality of a change, the most important factor to consider is the extent to which a product or service, as changed, differs from the requirements of the original contract.

See E. L. Hamm & Assocs., Inc., ASBCA No. 43792, 94-2 BCA ¶ 26,724 (change from lease to lease/purchase was out-of-scope); Matter of: Makro Janitorial Servs., Inc., B-282690, Aug. 18, 1999, 99-2 CPD ¶ 39 (task order for housekeeping outside scope of an IDIQ contract for preventive maintenance); Hughes Space and Communications Co., B- 276040, May 2, 1997, 97-1 CPD ¶ 158; Aragona Constr. Co. v. United States, 165 Ct. Cl. 382 (1964); 30 Comp Gen. 34 (B-95069)(1950)(stating that in a construction contract to build a hospital, modifying the contract to add another building to serve as living quarters for hospital employees was outside the scope of the contract).

b. Substantial changes in the work may be in-scope if the parties entered into a broadly conceived contract. AT&T Communications, Inc. v. Wiltel, Inc., 1 F.3d 1201 (Fed. Cir. 1993) (more latitude allowed where the activity requires a state-of-the-art product); Engineering & Professional Svcs., Inc., B-289331, 2002 U.S. Comp. Gen. LEXIS 11, 2002 Comp. Gen. Proc. Dec. ¶ 24 (provision of technologically advanced, ruggedized, handheld computers was not beyond the scope of the original contract that called for a wide array of hardware and software and RFP indicated the engineering change proposal process would be utilized to implement technological advances); Paragon Sys., Inc., B-284694.2, 2000 CPD ¶ 114 (contract awarded for broad range of services given wide latitude when issuing a task order); Gen. Dynamics Corp. v. United States, 585 F.2d 457 (Ct. Cl. 1978).

c. An agency’s pre-award statements that certain work was outside the scope of the contract can bind the agency if it later attempts to

modify the contract to include the work. *Octel Communications Corp. v. Gen. Servs. Admin.*, GSBCA No. 12975-P, 95-1 BCA ¶ 27,315 (appeal of decision granted on different grounds).

## 2. Changes in Quantity.

- a. Generally, the Changes clause permits increases and decreases in the quantity of minor items or portions of the work unless the variation alters the entire bargain.

*See Connor Bros. Const. Co. v. U.S.*, 65 Fed. Cl. 657 (2005) (modification of ductwork in Army hospital was not an out-of-scope change). *Cf. Lucas Aul, Inc.*, ASBCA No. 37803, 91-1 BCA ¶ 23,609. See also *Kentucky Bldg. Maint., Inc.*, ASBCA No. 50535, 98-2 BCA ¶ 29,846 (holding that agency clause that supplements the standard Changes Clause (a Hospital Aseptic Management Services clause) was not illegal).

- b. Increases and decreases in the quantity of major items or portions of the work are generally considered to be outside the scope of a contract.

*See, e.g., Valley Forge Flag Co., Inc.*, VABCA Nos. 4667, 5103, 97-2 BCA ¶ 29,246 (stating that in a requirements contract, a major increase in the total quantity of flags ordered (over 109,000) was outside the scope of the contract); *Liebert Corp.*, B-232234.5, Apr. 29, 1991, 91-1 CPD ¶ 413, 70 Comp. Gen. 448 (order in excess of maximum quantity was a material change). *But see Master Security, Inc.*, B-274990, Jan. 14, 1997, 97-1 CPD ¶ 21 (tripling the number of work sites not out-of-scope change); *Caltech Serv. Corp.*, B-240726.6, Jan. 22, 1992, 92-1 CPD ¶ 94, 1992 U.S. Comp. Gen. LEXIS 102 (increase in cargo tonnage on containerization requirements contract was within scope).

- c. Generally, increases are new procurements, and decreases are partial terminations for convenience (TforC). *Cf. Lucas Aul, Inc.*, ASBCA No. 37803, 91-1 BCA ¶ 23,609 (order was deductive change, not partial termination).

## 3. Number and Cost of Changes.

- a. Neither the number nor the cost of changes alone dictates whether modifications are beyond the scope of a contract. *PCL Constr. Serv., Inc. v. United States*, 47 Fed. Cl. 745 (2000) (series of contract modifications did not constitute cardinal change); *Triax Co. v. United States*, 28 Fed. Cl. 733 (1993); *Reliance Ins. Co. v. United States*, 20 Cl. Ct. 715 (1990), *aff'd*, 931 F.2d 863 (Fed. Cir. 1991) (over 200 changes still held to be within scope); *Coates Indus. Piping, Inc.*, VABCA No. 5412, 99-2 BCA ¶ 30,479; *Combined Arms Training Sys., Inc.*, ASBCA Nos. 44822, 47454, 96-2 BCA ¶ 28,617; *Bruce-Andersen Co.*, ASBCA No. 35791, 89-2 BCA ¶ 21,871.

- b. However, the cumulative effect of a large number of changes may be controlling. Air-A-Plane Corp. v. United States, 408 F.2d 1030 (Ct. Cl. 1969) (dispute involving over 1,000 changes sent back for trial on merits). See Caltech Serv. Corp., B-240726.6, Jan. 22, 1992, 92-1 CPD ¶ 94 at 5 (finding a 30 percent increase in workload volume is not beyond the scope of the original contract).
- 4. Changes in Time of Performance.
  - a. The Supply Changes Clause does not provide for unilateral acceleration of performance. FAR 52.243-1.
  - b. Under the Services Changes Clause, the contracting officer unilaterally may change “when” a contractor is to perform but not the overall performance period. FAR 52.243-1, Alternate I.
  - c. The Construction Changes Clause authorizes unilateral acceleration of performance. FAR 52.243-4(a)(4).
  - d. Granting a contractor additional time to perform will normally be considered within scope. Saratoga Indus., Inc., B-247141, 92-1 CPD ¶ 397.
- 5. Acceptance of a Change.
  - a. If a contractor performs under a change order, it may not subsequently argue that the change constituted a breach of contract. Ameritex Enter., Ltd. v. United States, 1997 U.S. App. LEXIS 3301 (Fed. Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998); Silberblatt & Lasker, Inc. v. United States, 101 Ct. Cl. 54 (1944); C.E. Lowther & Son, ASBCA No. 26760, 85-2 BCA ¶ 18,149. Similarly, once the contractor waives the breach and performs, the Government is obligated to pay for the out-of-scope work. Mac-Well Co., ASBCA No. 23097, 79-2 BCA ¶ 13,895.
  - b. Agreeing to a change does not convert an out-of-scope change into one that is within the scope of the contract for competition purposes; it simply means that the parties have agreed to process the change under the Changes clause. The contracting officer may not use modifications to avoid the statutory mandate for competition. Corbin Superior Composites, Inc., B-235019, July 20, 1989, 89-2 CPD ¶ 67, 1989 U.S. Comp. Gen. LEXIS 793.
  - c. Reducing Work. A bi-lateral modification for a reduced scope and repricing of work operates as an accord and satisfaction as to the subject matter of the modification. It bars any claim of breach or equitable adjustment arising from the modification. Corners and Edges, Inc., CBCA nos. 693, 762, 23 Sept 2008. Trataros

Construction, Inc. v. General Services Administration, GSBCA 15344, 03-1 BCA ¶ 32,251, at 159,459; Cygnus Corp. v. United States, 63 Fed. Cl. 150, 156 (2004), *aff'd*, 177 Fed Appx. 186 (Fed.Cir. 2006)(finding no government liability arising from bi-lateral modification eliminating database from option year of contract and repricing option year work.).

F. Scope Determinations and the Duty to Continue Performance.

1. In-Scope Changes: The contractor has a duty to continue performance pending the resolution of a dispute over an in-scope change.
  - a. *See* FAR 52.233-1(i), Disputes (stating that the “Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action *arising under the contract*, and comply with any decision of the Contracting Officer.”). *See* Appendix A. The term “arising under the contract” refers only to in-scope changes.” *See also* FAR 52.243-1(e), Changes – Fixed Price, and 33.213
  - b. Exceptions to the duty to proceed.
    - (1) The contractor may not have to proceed if the government improperly withholds progress payments. *See Sterling Millwrights v. United States*, 26 Cl. Ct. 49 (1992). *But see* D.W. Sandau Dredging, ENG BCA No. 5812, 96-1 BCA ¶ 28,064 (holding two late payments of 12 days and 19 days did not discharge the contractor from its duty to continue performance where contractor did not demonstrate the late payments had impacted its ability to perform).
    - (2) The contractor may not have to proceed if doing so is impractical. *See United States v. Spearin*, 248 U.S. 132 (1918)(government refused to provide safe working conditions); Xplo Corp., DOT BCA No. 1289, 86-3 BCA ¶ 19,125.
    - (3) The contractor may be justified in suspending performance if the government fails to provide clear direction. *See James W. Sprayberry Constr.*, IBCA No. 2130, 87-1 BCA ¶ 19,645 (contractor justified to await clarification of defective specifications). *Cf. Starghill Alternative Energy Corp.*, ASBCA Nos. 49612, 49732, 98-1 BCA ¶ 29,708 (a one-month government delay in executing modification did not excuse contractor from proceeding).

2. Out-of-Scope Changes: A contractor has **no duty to proceed** pending resolution of any dispute concerning a change that is outside the scope of the original contract (i.e. a “cardinal change”).
  - a. See FAR 52.233-1(i). *Alliant Techsys., Inc. v United States*, 178 F.3d 1260 (Fed. Cir. 1999); *CTA Inc., ASBCA No. 47062, 00-2 BCA ¶ 30,947*; *Airprep Tech., Inc. v. United States*, 30 Fed. Cl. 488 (1994). *Cities Service Helix v. U.S.*, 211 Ct. Cl. 222 (1976) (stating that if the government issues a modification that is outside the scope of the contract, then the contractor may elect not to perform the work covered by that modification).
  - b. Cardinal Change: An out-of-scope change is also called a “**cardinal change**.” It is a change to the contract that is so profound that it is not redressable under the contract and thus renders the Government in breach. *Thomson and Pratt Insurance Assoc., Inc., GSBCA No. 15979-ST, 2005-1 BCA ¶ 32,944*.
3. Uncertainty. Contractors may believe a given modification is out-of-scope. However, until that issue is adjudicated, they run the risk that non-performance could render them in breach should the modification be found to be in-scope. See FAR 52.233-1, Alternate I; DFARS 233.215 (mandating the use of this clause under some circumstances).

G. Fiscal Implications of Scope Determinations.

1. General. If a contract change is determined to be in-scope, it is considered a modification of the original *bona fide need* for the contract and may be funded as part of the original contract. See Fiscal Law Deskbook Chapter 3, Availability of Appropriations as to Time. If a change is determined to be out-of-scope, however, it is a new *bona fide* need that must be funded with current-year funds.
2. Antecedent Liability Rule:
  - a. When a contract modification does not represent a new requirement or liability, but only adjusts an earlier liability, the amount of that modification is said to “relate back” to the pre-existing, or **antecedent**, liability.
  - b. If the modification is within the scope of the original contract (see discussion in Part VI above), changes are funded with the same appropriation as the original contract, even if that appropriation has expired.
  - c. Examples.

- (1) Equitable Adjustments. When a contract price is made contingent upon certain performance costs that fluctuate unpredictably, the contract may include a clause allowing for equitable adjustment of the contract price. These clauses allow the government to increase (or decrease) contract price based on changes in the price of certain performance factors.
  - (2) Changes Pursuant to Changes Clause. If a contract modification is made pursuant to the contract's changes clause, it is considered within the scope of the contract, as it was authorized by the contract itself. In such cases, original funds may be used to pay for any cost increases.
3. Funding in-scope modifications.
  - a. As discussed above, if a contract modification is in-scope, it relates back to the original contract for funding purposes. If the original appropriation is still available for new obligations (i.e. has not expired at the end of the fiscal year), it may be committed and obligated following standard procedures.
  - b. If the original appropriation used for the contract has expired, but not yet closed, the contracting officer may choose to seek expired funds for the modification. However, this requires increasingly higher levels of approval.
    - (1) Changes in excess of \$4 million must be approved by the Under Secretary of Defense (Comptroller) (USD(C)). DOD FMR, Vol. 3, Ch. 10, para. 100204.
    - (2) Changes in excess of \$25 million requires notice be given to the Congressional Armed Services and Appropriations Committees for both the House and Senate, and a 30-day waiting period. DOD FMR, Vol. 3, Ch. 10, para. 100205.
  - c. If the original appropriation is closed, or if no funds remain in otherwise available expired appropriations accounts, the contracting officer should use current-year funds to fund the contract modification.

## **VII. CONTRACTOR NOTIFICATION REQUIREMENTS.**

- A. Formal Changes. The standard Changes clauses each state that "the Contractor must assert its right to an adjustment . . . within 30 days after receipt of a written [change] order." Courts and boards, however, do not strictly construe this requirement unless the untimely notice is prejudicial to the government. Watson,

Rice & Co., HUD BCA No. 89-4468-C8, 90-1 BCA ¶ 22,499; Sosa Y Barbera Constrs., S.A., ENG BCA No. PCC-57, 89-2 BCA ¶ 21,754; E.W. Jerdon, Inc., ASBCA No. 32957, 88-2 BCA ¶ 20,729.

B. Constructive Changes.

1. Supply / Service Contracts. The standard supply and service contract Changes clauses do not prescribe specific periods within which a contractor must seek an adjustment for a constructive change.
2. Construction Contracts. Under the Changes clause for construction contracts, a contractor must assert its right to an adjustment within 30 days of notifying the government that it considers a government action to be a constructive change. FAR 52.243-4(b) and (e). Furthermore, unless the contractor bases its adjustment on defective specifications, it may not recover costs incurred more than 20 days before notifying the government of a constructive change. FAR 52.243-4(d). *But see* Martin J. Simko Constr., Inc. v. United States, 11 Cl. Ct. 257 (1986) (government must show late notice was prejudicial), *vacated in part, on other grounds, by* 852 F.2d 540 (Fed. Cir. 1988).
3. Content of Notice. A contractor must assert a positive, present intent to seek recovery as a matter of legal right. Written notice is not required, and there is no formal method for asserting an intent to recover. The notice, however, must be more than an ambiguous letter that evidences a differing opinion. Likewise, merely advising the contracting officer of problems is not sufficient notice. CTA Inc., ASBCA No. 47062, 00-2 BCA ¶ 30,947; McLamb Upholstery, Inc., ASBCA No. 42112, 91-3 BCA ¶ 24,081.

C. Requests for Equitable Adjustment.

1. A contractor may first file an **intent to submit** a request for equitable adjustment, and then file an actual request for an adjustment to the contract price or other delivery terms at a later time. The above requirement for the contractor to assert its rights to an adjustment places the government on notice that there has been an actual or constructive change to the contract, thus permitting the government to possibly adjust its action/inaction.
2. For contracts awarded before October 1, 1995, the contractor's request for an equitable adjustment must be made within a **reasonable time** unless the contract specifies otherwise. Generally, this will require the contractor to act while the facts supporting the claim are readily available. *See* LaForge and Budd Construction Co. v. United States 48 Fed. Cl. 566 (2001) (finding *laches* did not bar a contractor's claim submitted seven years after its accrual because the government did not demonstrate it was prejudiced).



3. Effect of Final Payment.
  - a. Requests for equitable adjustments raised for the first time after final payment are untimely. Design & Prod., Inc. v. United States, 18 Cl. Ct. 168 (1989) (final payment rule predicated on express contractual provisions); Navales Enter., Inc., ASBCA No. 52202, 99-2 BCA ¶ 30,528; Electro-Technology Corp., ASBCA No. 42495, 93-2 BCA ¶ 25,750.
  - b. Final payment does not bar claims for equitable adjustments that were pending or of which the government had constructive knowledge at the time of final payment. Mingus Constructors, Inc. v. U.S., 812 F.2d 1387 (Fed. Cir. 1987); Miller Elevator Co. v. U.S., 30 Fed. Cl. 662 (1994); Gulf & Western Indus., Inc. v. United States, 6 Cl. Ct. 742 (1984); Navales Enter., Inc., ASBCA No. 52202, 99-2 BCA ¶ 30,528; David Grimaldi Co., ASBCA No. 36043, 89-1 BCA ¶ 21,341 (contractor must specifically assert a claim as a matter of right; letter merely presented arguments).
4. Government Requests for a Downward Equitable Adjustment.
  - a. The Changes clauses do not specify the time within which the government must claim a downward equitable adjustment. They also do not require the government to notify the contractor that it intends to subsequently assert its right to an adjustment.
  - b. For contracts awarded subsequent to October 1, 1995, the government must assert any claims it has against a contractor within six years from the accrual of the claim, except claims based upon fraud. See 41 U.S.C § 605 and FAR 33.206(b).
  - c. For contracts awarded both before and after October 1, 1995, the government's request for an equitable adjustment must be made within a reasonable time unless the contract specifies otherwise. Generally, this will require the government to act while the facts supporting the claim are readily available and before the contractor's position is prejudiced by final settlement with its subcontractors, suppliers, and other creditors. See Aero Union Corp. v. United States, 47 Fed. Cl. 677 (2000) (denying motion for summary judgment where there were issues of fact concerning whether the government had delayed so long the plaintiff was prejudiced by the delay).

## VIII. CONCLUSION.

- A. Contract changes are often required during contract performance. They are either formal (written and intentional) or informal (unintentional, constructive). Formal

contract changes may be unilateral, issued by the contracting officer pursuant to changes clauses in the contract. They may also be bilateral, constituting a supplemental agreement between the parties. Informal contract changes are not issued in writing and often result from government conduct, unforeseen impediments to performance, or other factors. They may be adopted formally, rejected and the contractor absolved of performance, or disputed as not truly being contract changes.

- B. Changes must be within the scope of the original contract. Scope determinations require an evaluation of quantity, type of work, and other factors to determine whether the contract, as changed, represents substantially the same contract as originally awarded. This is evaluated through the lens of incumbent contractors who may not want the additional responsibility of performing new work, or from the perspective of potential bidders who would have competed for the contract as changed, but did not compete for the contract as originally advertised.
- C. In all cases, contract changes that require additional funding may be funded from the appropriation that originally funded the contract if the change is within the scope of the original. Otherwise, or if no money remains from the original appropriation, the change must be funded with current appropriations.